

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DEBORAH D. PETERSON, *et al.*,

Plaintiffs,

v.

13 CV 9195 (LAP)

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants.

Oral Argument
(via Skype)

FIONA HAVLISH, *et al.*,

Plaintiffs.

v.

16 CV 8075 (LAP)

CLEARSTREAM BANKING S.A.,
Et al.,

Defendants.

New York, N.Y.
March 4, 2021
10:05 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

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BY: UGO COLELLA

1 (Case called)

2 THE COURT: Counsel for Peterson, please, the Peterson
3 plaintiffs.

4 MR. BONNER: Good morning, your Honor, my name is Jim
5 Bonner.

6 THE COURT: Good morning.

7 Counsel for the Havlish plaintiffs.

8 MR. MITCHELL: Good morning, your Honor, my name is
9 Doug Mitchell.

10 THE COURT: Good morning, Mr. Mitchell.

11 Counsel for Clearstream, who has just joined us?

12 MR. KAMINETZKY: Good morning, your Honor, Benjamin
13 Kaminetzky of Davis Polk for Clearstream Banking.

14 THE COURT: Counsel for Bank Markazi.

15 MR. KRY: Good morning, your Honor, Robert Kry with
16 MoloLamken.

17 THE COURT: Good morning.

18 Counsel for Ubae.

19 MR. COLELLA: Your Honor Ugo Colella.

20 THE COURT: Good morning, counsel. Thank you for
21 being present. I think we are going to have a lot of fun.

22 I know you thought about dividing it up, but I
23 wondered if I might ask you some questions first and then see
24 what, if anything, you want to add after that. Is that all
25 right with you?

1 MR. BONNER: Of course, your Honor.

2 THE COURT: Mr. Bonner, if I could start with you, and
3 let's talk a little bit about the notwithstanding clause in
4 Section 8772. You say that because of that class you are not
5 required to show personal jurisdiction is proper as to
6 Clearstream, under New York's long arm statute.

7 First, how can you read the notwithstanding clause as
8 saying that? It's in a paragraph that's entitled interests in
9 blocked assets. We know that Congress knows how to write a
10 nationwide service-of-process statute. This ain't it, I don't
11 think.

12 And the question is, why do you think that the
13 notwithstanding language in Section 8772 relieves you of any
14 obligation to show proper jurisdiction under the New York long
15 arm statute?

16 MR. BONNER: In the *Rubin* decision, your Honor, from
17 the Supreme Court in 2018, the Court also interpreted a
18 notwithstanding clause. And what it said was that 28 U.S.C.
19 1610, which is another provision of the FSIA, didn't provide a
20 sovereign immunity exception because it lacked what the Court
21 called a textual marker, notwithstanding any other provision of
22 law.

23 So here we have the same language, notwithstanding any
24 other provision of law, and what the Court said was that if a
25 statute had such language in it that that would do away with

the need to provide for any immunity -- that it would provide a sovereign immunity exception. So the courts have said, very broadly, that if you have a notwithstanding clause in a statute, that that eliminates sovereign immunity.

Our argument on that, your Honor --

THE COURT: How does that translate into not having to show amenability under the New York long arm statute?

MR. BONNER: Because by the same logic, your Honor, the Court says that you don't have to show another basis for subject matter jurisdiction. No one has given any reason why that same language doesn't apply --

THE COURT: The long arm statute doesn't talk about subject matter jurisdiction. It talks about personal jurisdiction.

MR. BONNER: Yes, your Honor. But the language is quite broad. It says: Notwithstanding any other provision of law. The Court says: That's a basis for subject matter jurisdiction. There is no reason why it also doesn't apply to personal jurisdiction.

The Second Circuit in *Weinstein* reached the same conclusion, that the language notwithstanding any other provision of law provides an independent basis for jurisdiction. Again, that's *Weinstein*, the Second Circuit from 2010.

THE COURT: Right. But wasn't that original

1 jurisdiction suits in that case?

2 MR. BONNER: No. Those were TRIA actions. Under 1610
3 there is a footnote in TRIA which has a provision which applies
4 to collecting the assets of the agencies or of a foreign
5 sovereign that has been found liable under the terrorism
6 exception to the Foreign Sovereign Immunities Act.

7 In any event, your Honor, I think that this question
8 is one that's much ado about nothing with respect to
9 Clearstream because nobody has contended that if we satisfy the
10 requirements for due process, the minimum contacts test and the
11 reasonableness test, that we also would not satisfy the
12 requirements for personal jurisdiction under New York law,
13 under 302 of the CPLR.

14 The cases that we cited in our opening brief made that
15 point. It's basically the same test, your Honor, and the
16 Second Circuit has noted that there has never been a case, as
17 far as it can tell, where someone satisfies due process but
18 does not satisfy the requirements of the CPLR.

19 At the end of the day, your Honor, this is not an
20 issue that I think should trouble the Court.

21 THE COURT: I just question your suggestion that we
22 should skip over that depth. Again, is there any case that has
23 just skipped over that step?

24 MR. BONNER: Of course, your Honor, it's a statute
25 onto itself. It is a one off statute. So there is nothing

1 || interpreting this statute per se.

2 But, again, both the Supreme Court and the Second
3 Circuit have said that this notwithstanding language provides a
4 basis by itself for subject matter jurisdiction, and I don't
5 see any reason why that wouldn't apply with equal logic to the
6 personal jurisdiction standard.

7 THE COURT: They didn't say that.

8 || Mr. Kaminetzky, what do you say on that issue?

9 MR. KAMINETZKY: Thank you, your Honor.

10 This will be the last time, I'm sure, I will agree
11 with Mr. Bonner.

12 I obviously agree with your Honor that the Court
13 shouldn't skip over the CPLR and that there is absolutely no
14 authority to say that the notwithstanding language in the 2772
15 statute somehow does away with the New York long arm statute.

16 That being said, courts have recognized that there is
17 quote/unquote a striking similarity between the New York and
18 due process standards. So I do agree with Mr. Bonner, to the
19 extent that we will show the Court that two out of the three
20 elements of personal jurisdiction here, specific personal
21 jurisdiction, the arising-out-of prong, as well as the
22 reasonableness prong, that, under those two standards,
23 Clearstream is not subject to specific jurisdiction under the
24 due process standard, and, of course, they are also not subject
25 to jurisdiction under the long arm statute.

1 If you will, your Honor, I kind of agree that because
2 we are not subject to jurisdiction under either test, it may
3 not make sense for the Court to spend much more time on this
4 issue, although it's obviously correct.

5 THE COURT: I am going to have some more questions for
6 you on this in just a minute, but I want to continue to bother
7 Mr. Bonner, if you don't mind.

8 Mr. Bonner, in talking about whether or not the
9 Markazi bank is the beneficial owner of the right to payment,
10 the Court of Appeals has told us very clearly that the asset
11 you are seeking to have turned over is a right to payment
12 located in Luxembourg.

13 My question to you, sir, is why are we looking to New
14 York law to figure out who is the beneficial owner of that
15 asset? Shouldn't we be looking at Luxembourg law, where the
16 asset is located?

17 MR. BONNER: I think typically, your Honor, what
18 courts do is that they apply their own local law, unless there
19 has been a conflict that has been opposed. Here we don't have
20 any information from Luxembourg that shows that there is any
21 difference in the law in Luxembourg as opposed to New York.

22 I think the really salient important point here, your
23 Honor, in determining who is the owner of this asset is, what
24 are the rights and the responsibilities that the various
25 parties have in these assets.

1 So what we know is that Markazi has all of the
2 economic rights to these assets. It has the right to the
3 proceeds of these bonds. It has the right to sell the bonds,
4 if it wants to. It has the right to control what's done with
5 those bonds.

6 And what the Second Circuit has said is, in the *Asia*
7 *Pulp* case, that when we look to state or foreign law to
8 determine whether a federal statute has been satisfied, we look
9 to the state or the foreign law only to determine what the
10 various rights and responsibilities are of the parties in those
11 assets.

12 So here, under either New York law -- and when we look
13 to the contractual obligations that are set forth in the
14 Clearstream customer agreement, or even when we look to
15 Luxembourg law, it doesn't make any difference here, your
16 Honor, because under all of those standards, all of the
17 economic rights belong to Bank Markazi, not to Ubae, which is
18 only a custodian of those assets. That's what the Court found
19 in *Peterson 1*.

20 Then the second step of the analysis under *Asia Pulp*,
21 your Honor, turns us back to federal law, and the standard here
22 is who is the beneficial owner of these assets. That's the
23 standard that's set forth in the statute. So the only answer
24 to that question, because of the fact that Markazi owns all of
25 the economic rights in the assets, is the beneficial owner is

1 Bank Markazi, as the Court found in Peterson 1.

2 Again, your Honor, I think that this choice of law
3 issue is not something that is of any great importance here
4 because all of the various sources of law, whether we look at
5 the contract that the parties signed, whether we look to New
6 York law, or whether we look to Luxembourg law, they are all
7 uniform in that all of the actual economic rights in this asset
8 belong to Bank Markazi, not to Ubae, a mere custodian.

9 THE COURT: Let me ask you a little bit more about
10 Bank Markazi's arguments. What do you make of its argument
11 that your people have not put forward any admissible evidence
12 showing that Markazi is Iran's alterego? They acknowledge that
13 you have alleged some facts in the complaint, but then they say
14 they have put in admissible evidence to the contrary.

15 What do you say to that?

16 MR. BONNER: That issue, your Honor, is only relevant
17 with respect to the narrow issue on the motion to dismiss,
18 whether Bank Markazi is entitled to any constitutional rights
19 whatsoever. In connection with our summary judgment motion, we
20 didn't make the alterego argument under *Bancec*, although the
21 statute, for certain purposes, makes Markazi the alterego of
22 Iran.

23 Here is what I say, your Honor, and I think that
24 procedurally we have a real problem here from Bank Markazi's
25 perspective. We had allegations in our complaint that Markazi

1 was Iran's alterego. We mentioned that in our moving papers on
2 summary judgment, although we said we are not going to rely
3 upon those allegations for the purposes of the summary judgment
4 motion. Bank Markazi files a motion to dismiss. It says
5 nothing whatsoever about the alterego issue. And only on the
6 reply do we get an affidavit from one of its employees talking
7 about all of these facts. So we have not had the opportunity,
8 your Honor, to write about that issue at all, and I think what
9 courts have done in these circumstances, two things, your
10 Honor.

11 Either, A, they have accepted the plaintiffs'
12 allegations for jurisdictional purposes at the
13 motion-to-dismiss stage and allow discovery to proceed, or the
14 courts have allowed the parties to conduct some discovery about
15 this issue so that the conflicting allegations backwards and
16 forwards from our expert, Dr. Clausen, and from their employee
17 can be tested.

18 And I think that that's particularly important here,
19 your Honor, because we have a bank that's been designated as a
20 money launderer by the United States Government, the only one
21 in history that's suffered that sanction.

22 We have had some evidence here that has shown that
23 Markazi's witnesses have a bit of a flexible relationship with
24 the truth, your Honor. I think it's very important that we
25 don't decide at the motion-to-dismiss stage this issue without

1 providing the plaintiffs with an opportunity to rebut the
2 evidence that has been submitted by Markazi and to test that
3 evidence, your Honor, given the fact that we haven't received
4 any discovery to date from Bank Markazi.

5 THE COURT: One more question. Assuming for a moment
6 the due process protections do apply to Bank Markazi, what
7 contacts do you rely on that you say the bank has in the United
8 States to support jurisdiction? Now, the bank says that it
9 exercised no control whatsoever over Clearstream's
10 correspondent banking activities in the United States. It says
11 we have no contacts. What do you say?

12 MR. BONNER: We say, your Honor, that all of the
13 contacts that Clearstream had, which were enormous with the
14 United States, were passed in 62 separate transactions over the
15 course of over four years, \$1.68 billion through the United
16 States banking system for Bank Markazi. The proceeds of its
17 bonds were collected here and this entire relationship was
18 built on the fact that Clearstream would be able to provide
19 that service for Bank Markazi, putting its money through the
20 United States banking system so that Markazi could enjoy the
21 fruits of its bonds and get the economic benefits of those
22 bonds.

23 Their argument, as I said, your Honor, is they
24 asserted no control --

25 THE COURT: Let me just interrupt you for a minute.

1 I thought your argument was that because of the agency
2 relationship, all of Clearstream's activities, the 62 payments
3 and all that other stuff, were attributable to Bank Markazi.

4 MR. BONNER: That's correct, your Honor. And I was
5 perhaps a little bit too long winded, but I was getting to that
6 point. I should have been more succinct.

7 The control argument ignores the principle that the
8 principal only needs some control over the activities of the
9 agent, and the Second Circuit has made that clear. There is a
10 *Cutco* case and there are other cases. But that's a
11 well-established principle of law. And the courts have also
12 recognized that that level of control is often established at
13 the very outset of the parties' relationship.

14 What happened here was, the parties established a
15 contractual relationship, your Honor, which mandated that
16 Clearstream follow the directions that Markazi gave to it
17 regarding its bonds, and that's the same under the Luxembourg
18 law. It's the same under the UCC. When the owner of the bond
19 says collect my proceeds, you have to go out and collect those
20 proceeds.

21 Here we have the principal, Bank Markazi, directing
22 its agent, Clearstream, collect my proceeds. And we also have
23 bond prospectuses which say that those proceeds can only be
24 collected in New York.

25 So Markazi, the investor, gets a prospectus. It says,

here are the bonds. You can only collect those proceeds in New York. And, on top of that, you can only collect them through three entities: Clearstream, Euroclear, or the DTC.

So the control here, your Honor, was established right at the outset of this relationship where Bank Markazi authorized and assigned Clearstream the task of collecting these proceeds for it in New York.

Again, the courts have said that the amount of control that's required doesn't have to be about the nitty gritty of what the agent is going to do. According to the courts, it can be quite -- what's the language that they utilize. In any event -- I'm sorry, your Honor?

THE COURT: For lack of a better word, quite loose.

MR. BONNER: It can be quite loose control, your Honor.

Here we have a contractual obligation that they had to go and collect these assets and, as a result, the contacts, the very extensive contacts that Clearstream had with New York, are attributable to Markazi.

We have cases, your Honor, that are about collection of assets on behalf of investors, including a Supreme Court case, *Pearson*, from 1939. And there a trust company acted as an investor's agent in collecting principal and income, and the Court said, that's a principal/agent relationship.

As a result of that, I think the control point, it

1 doesn't really work for Markazi because the salient point here
2 is that the account agreement and all applicable law required
3 Clearstream to take these actions, give it no discretion with
4 respect to collecting these assets for Bank Markazi, and they
5 had to do it in New York. Markazi says, we don't know who
6 their correspondent banking accounts are with, and we don't
7 tell them who to handle their corresponding banking
8 relationships with. But that, your Honor, is well beyond the
9 level of control that courts have required in order to have a
10 principal agency relationship.

11 THE COURT: That's the nitty gritty argument.

12 Mr. Kry, is counsel not correct on this?

13 MR. KRY: For a couple of reasons, your Honor.

14 First, although it's true that New York doesn't
15 require absolute control over the agent's functions, it does
16 require some control, and that just doesn't exist here. You
17 can look at the documents that Mr. Bonner cited, the bond
18 prospectuses and the general terms and conditions, and there is
19 nothing in there that gives Bank Markazi any control over how
20 Clearstream collects bond payments.

21 THE COURT: Why does it have to? It is clear that it
22 has to be done in New York and it is clear that Clearstream is
23 one of the three entities that can do it. Why is it not
24 sufficient that the agreement says we will collect your
25 proceeds?

1 MR. KRY: Respectfully, your Honor, that's not what
2 the documents say. The bond prospectuses, these are at
3 Exhibits 64 and 65 of Mr. Vogel's original declaration. They
4 do not say that proceeds must be received in New York. All
5 they say is that they will be paid.

6 THE COURT: The prospectus says that they are going to
7 be paid in New York.

8 MR. KRY: No, your Honor. It says they will be drawn
9 from a New York account. You can look at those bond
10 prospectuses. They do not say they must be received in New
11 York. They say they will be drawn from a New York account.

12 THE COURT: It's possible to get those proceeds
13 without doing anything in New York?

14 MR. KRY: Well, the payer, the issuer of the bond,
15 will issue those payments from New York. But the correspondent
16 account that the recipient has does not need to be maintained
17 in New York. There is nothing in the prospectuses that says
18 that, your Honor.

19 THE COURT: Let me interrupt you for a minute and go
20 back to Mr. Bonner and see what he says about that.

21 Mr. Bonner.

22 MR. BONNER: That's incorrect, your Honor. The
23 prospectuses say that the payments -- either they are going to
24 be made by check, which is singularly unlikely, or that the
25 receiver is going to accept them at a bank account in New York.

1 But irrespective of that, your Honor, Markazi well
2 knew that Clearstream was performing this function in New York.
3 There is no doubt about that here. And it doesn't matter.
4 They told him to go out and collect it.

5 The manner in which Clearstream carries out its
6 day-to-day responsibilities, that's not the level of control
7 that's required here. They are assigned by Markazi to go out
8 and collect those bond proceeds, which, again, could only be
9 paid in New York, and everyone knew that Clearstream was
10 collecting them in New York. That's why the defendants went
11 into this machination of trying to put Ubae into this as an
12 intermediary.

13 THE COURT: Let me go back to Mr. Kry and see what
14 else he wants to say on this.

15 MR. KRY: Your Honor, the only point I have is, it's
16 not a knowledge standard, it is a control standard, so there
17 needs to be some level of control over the specific function at
18 issue.

19 If I can give an example, your Honor, if we have a law
20 firm that represents clients in court, of course that law firm
21 is acting as an agent when it makes arguments on behalf of its
22 clients in court because the client has some level of control
23 over that.

24 But if that law firm then turns around and deals with
25 suppliers and vendors for its paper, for its electricity, for

1 its IT infrastructure, all the things it does to run its
2 business, it is not acting as an agent with respect to those
3 functions because the client doesn't have any control over
4 them, and this is no different.

5 THE COURT: Of course, there is no argument here that
6 I've seen that Clearstream was acting beyond the scope of its
7 agency.

8 MR. KRY: That is our argument, your Honor. Our
9 argument is that the scope of Clearstream's agency was that
10 Clearstream held Bank Markazi's bonds and proceeds in its
11 account in Luxembourg. What Clearstream may have done with its
12 own vendors and suppliers who run that business, the
13 correspondent accounts it may have relied on in other
14 countries, that was entirely up to Clearstream's discretion.
15 The evidence before the Court --

16 THE COURT: Isn't that the point, counsel? Within the
17 scope of the relationship those nitty gritty details were up to
18 Clearstream.

19 MR. KRY: Those were not within the scope of the
20 relationship, your Honor. It's like the law firm that has to
21 buy computer equipment. The agency doesn't have anything to do
22 with that.

23 THE COURT: Markazi says to Clearstream, collect my
24 proceeds. Markazi doesn't tell them how to do it. Clearstream
25 does it in the manner that it does it, right? How can that be

1 wrong?

2 MR. KRY: Because Markazi has no right to demand that
3 Clearstream do that in any particular way. It doesn't have the
4 absolute right. It doesn't have any right. There is no
5 control over that function. And the declaration that
6 Mr. Massoumi put in about that relationship is very clear on
7 that. There is no control on the part of Bank Markazi over how
8 Clearstream performs those functions.

9 THE COURT: Why does there have to be control at that
10 nitty gritty level for there to be an agency relationship?

11 MR. KRY: Because it's not a matter of a nitty gritty
12 or a broader level, your Honor. It's a matter of, what does
13 the agency relationship extend to? How broad is it? There is
14 no question clear that Clearstream was Bank Markazi's agent for
15 holding bonds and proceeds in Luxembourg.

16 It's a very different question about whether
17 Clearstream was acting as Bank Markazi's agent when it dealt
18 with its own suppliers, its own vendors to do the various
19 things it needed to do to run its business. At the very least,
20 your Honor, there is a genuine dispute of fact. This is not a
21 summary judgment issue.

22 Mr. Massoumi's declaration on this point, which is
23 undisputed, by itself is sufficient to create a genuine
24 disputed fact over whether those activities were within the
25 scope of the agency relationship.

1 So it's not a question of nitty gritty versus broad
2 strokes. It's a question about what is within the scope of the
3 agency relationship and what falls outside it because it is
4 simply a matter of --

5 THE COURT: Mr. Bonner, quick question. What do you
6 say to counsel's argument about disputed issue of fact?

7 MR. BONNER: I just think that that's absolutely
8 incorrect, your Honor.

9 The point here is that there is a contract that says
10 you go out and collect my assets. The comparison that's being
11 made, my law firm goes out and buys paper, my client has no
12 issue or control or any desire, even, to have anything to do
13 with me buying paper.

14 Here, the entire basis of the Markazi/Clearstream
15 relationship is that Clearstream is going is to go out and
16 collect these bond proceeds, the principal and the interest on
17 these bonds. It's the most essential thing that Clearstream is
18 doing. It can't decide it's not going to do that, so there is
19 no issue of fact here. Mr. Massoumi wants to say, I didn't
20 know, how can I possibly know, which is incorrect. It's also
21 contrary to what he said back in 2008, when he submitted an
22 affidavit and said that one of the reasons why --

23 THE COURT: He used Clearstream because they provided
24 efficient bond collection services.

25 MR. BONNER: Exactly, your Honor.

1 Even then, we have now a sham affidavit that's
2 contrary to what was said more contemporaneously.

3 In any event, that's not the real issue here, your
4 Honor. It's the my-law-firm-buying-paper issue. That's not
5 the level of control that's required here. It's the assignment
6 that's made in this party's contractual relationship that
7 establishes the agency and, as you said or suggested, that's
8 well within the scope of Clearstream's agency.

9 MR. KRY: Your Honor, can I just take exception to
10 that comment there, that this was a sham affidavit. To be
11 perfectly clear, Ms. Massoumi's affidavit now and the one he
12 did before are absolutely consistent. He has never denied that
13 Bank Markazi had knowledge of Clearstream's correspondent
14 account or the fact that Clearstream would potentially use that
15 correspondent account in its business. The issue is control
16 and that's the topic his affidavit addresses now. It's
17 absolutely consistent with the prior one, and there is simply
18 no basis for that kind of aspersion.

19 THE COURT: Stop.

20 Mr. Bonner, one more question on this, please.

21 Mr. Bonner, Markazi argues that Clearstream's
22 establishment of the blocked account was on its own hook.
23 Markazi didn't tell it to do that. No other principal told it
24 to do that. That's all on Clearstream's head and, therefore,
25 the blocked account can't be considered part of the agency

1 relationship.

2 MR. BONNER: Your Honor, that is not really a very
3 important issue to me in the case.

4 What happened was, there were sanctions that were
5 imposed by the U.S. Government and by European authorities, as
6 well as the fact that the plaintiffs obtained a restraining
7 notice which prevented Clearstream from handing money over to
8 Bank Markazi.

9 Clearstream didn't want to subject itself to sanctions
10 by the U.S. Government, by the EU, and potentially a violation
11 of the plaintiffs' restraining notice, so it put the money into
12 a blocked account, which it had to do by law.

13 The fact that it wasn't brave enough to go ahead and
14 hand the money over to Bank Markazi doesn't, for jurisdictional
15 purposes, somehow nullify the fact that these assets were
16 collected in New York and all of the other contacts that we
17 have spoken about.

18 Yes, it's true, neither Banca Ubae nor Markazi are
19 happy with the fact that this blocked account has been created
20 and the money has been put in there, but that doesn't defeat
21 all of this activity that was going on in New York in order to
22 collect these assets at the direction of Bank Markazi and Ubae.

23 THE COURT: Mr. Kry, do you have any comment on that,
24 sir?

25 MR. KRY: Our understanding of the personal

jurisdiction theory is their agency theory. If there is no agency relationship with respect to the collection of those proceeds, it seems conceded there is no jurisdiction over Bank Markazi.

Whether there was personal jurisdiction over Clearstream is a separate question. If your Honor doesn't think there was personal jurisdiction over Clearstream, then necessarily we can't be hauled in on an agency relationship, but on that separate question I would just defer to Clearstream's counsel.

THE COURT: Thank you.

Mr. Bonner, if I can continue to bother you, on your request for a preliminary injunction, certainly you have a higher standard here because you are not preserving the status quo, but you are looking to upset the status quo and to get, you say, the bond proceeds transferred back.

First of all, is a preliminary injunction really necessary here? And why is plaintiffs' interest in changing the status quo greater than Clearstream's where, for example, it argues that it might be subject to double liability here. Why the need for a preliminary injunction?

MR. BONNER: The need for a preliminary injunction has arisen, your Honor, because Markazi has gone to the courts of Luxembourg and it's attempting now to put an additional hurdle up for the plaintiffs to satisfy.

1 Even if this Court orders by summary judgment that
2 these assets be surrendered to the plaintiffs, what Markazi is
3 trying to do and Luxembourg right now is to force the
4 plaintiffs to then go overseas and to obtain an order from the
5 Luxembourg courts to allow those assets to be paid to the
6 plaintiffs. That's creating the irreparable injury that we
7 talk about, your Honor.

8 As opposed to the question of the relative burdens on
9 Clearstream versus the plaintiffs, we have been trying for 13
10 years to collect these assets, your Honor. We have gone all
11 over the world to try to do that, different countries here in
12 the United States, obviously, as well. So there has been a
13 tremendous amount of burden that's been imposed upon the
14 plaintiffs for the past 13 years.

15 There is a good deal of woe is me in the Clearstream
16 briefs. I think objectively it's hard to generate a lot of
17 sympathy for Clearstream, which came to the U.S., set up its
18 operations in the financial capital of the world to provide
19 services to its clients in the banking community and then
20 decided that it would provide services to a U.S. Government
21 designated money launderer and a state that has been designated
22 as a terrorist entity since 1983. When we consider the
23 relative burdens, I think that those are factors that the Court
24 needs to take into consideration.

25 But, more importantly, Bank Markazi, after seven

1 years, is the party that's really trying to upset the apple
2 card here, your Honor. This litigation has been pending for
3 seven years and it hasn't been until the last six months or so
4 that Markazi has gone to the courts of Luxembourg and tried to
5 essentially set it up as an appellate court for this Court's
6 decision making.

7 That's the reason why we think to preserve the status
8 quo, your Honor, rather than to change it, we should bring
9 these assets here to the United States where if the Court
10 decides that we are entitled to collect them, we will be able
11 to collect them. If this Court decides that we are not
12 entitled to collect them, they can go back to Bank Markazi and
13 to Clearstream. But it's unfair to the plaintiffs to allow
14 this litigation collaterally to proceed in Luxembourg, where
15 it's attacking the ability of this Court to implement its
16 judgment at the end of the day, should the Court award
17 plaintiffs summary judgment or judgment in any way, shape, or
18 form.

19 THE COURT: Let me ask you a follow-up on that. The
20 preliminary injunction that you seek is an order requiring the
21 bond proceeds to be returned to New York. Doesn't the Court of
22 Appeals tell us that the right to payment has only ever existed
23 in Luxembourg? Does that make a difference?

24 MR. BONNER: No, your Honor. I think that Clearstream
25 could simply reverse the transaction by which it debited the

1 account in New York and credit it to the account in Luxembourg,
2 and that would accomplish what the plaintiffs have requested
3 here, your Honor. So all they need to do is to reverse that
4 transaction.

5 I would also note that in the last case there was the
6 same situation, your Honor, where Clearstream was arguing that
7 the asset only existed in Luxembourg. Different situation.
8 There was money that had been set aside by Citibank here in New
9 York. But all of these mechanical difficulties that
10 Clearstream is trying to conjure, if they don't want to hold
11 the right to payment when it comes back to the United States,
12 we will find another financial institution that will hold that
13 asset. But all they have to do is to reverse that transaction
14 where they credited Luxembourg. The asset will be back here in
15 the United States, and that way the court's jurisdiction will
16 be protected. There won't be this artificial Luxembourg
17 appellate court to decide whether the plaintiffs or the
18 defendants win this case.

19 THE COURT: Thank you.

20 Mr. Kaminetzky, can I bother you for a while?

21 MR. KAMINETZKY: Please.

22 THE COURT: May I ask you, sir, why is it that you
23 contend that all of Clearstream's activities in New York are
24 totally irrelevant? We know that the bonds were denominated in
25 U.S. dollars. Clearstream was responsible, through its

1 relationship with JPM, for facilitating the receipt of those
2 payments and on and on and on.

3 How do you say that those are in any way irrelevant to
4 the proposition of personal jurisdiction?

5 MR. KAMINETZKY: Thank you, your Honor.

6 Let me start, actually, where the last dialogue with
7 Mr. Bonner ended.

8 So point one. And what I'm particularly picking up on
9 is what Mr. Bonner said about reversing the transaction.

10 What he just said was rejected by Judge Forrest once
11 and the Second Circuit twice. There was no transaction. There
12 was no transfer of money between New York and Luxembourg. I
13 don't know how many different courts need to say that. But
14 that is now a matter of fact that has been established by the
15 Second Circuit. So there is no transaction to reverse.

16 This property that's subject to this turnover action
17 has always been in Luxembourg, has never been in New York, and
18 legally could never be in New York because Clearstream is not
19 allowed to hold deposits in New York. What we are talking
20 about is a turnover action for property that has always been in
21 Luxembourg.

22 And the reason why it's important for your Honor to
23 remember --

24 THE COURT: Let me interrupt you and ask you this.

25 How did it come to pass that the bond proceeds, which

1 are payable in dollars in New York, made their way to
2 Luxembourg?

3 MR. KAMINETZKY: Those bond proceeds never made their
4 way to Luxembourg, and that is such an important factor.
5 Mr. Bonner just won't accept that the Second Circuit has ruled
6 now twice.

7 What happened was, the money was put in Clearstream's
8 correspondent account in JP Morgan. That is 100 percent
9 Clearstream's money. That night, and many times since then,
10 Clearstream had emptied that account and used that money for
11 whatever purposes it wanted.

12 What happened in Luxembourg is simply an account entry
13 on the books and records in Luxembourg that now there is a
14 debit or now there is a credit to the Ubae account in
15 Luxembourg. There is never a transfer. The JP Morgan money
16 stayed at JP Morgan for Clearstream and Clearstream used that
17 to pay whatever dollar obligations it had.

18 Going back --

19 THE COURT: Is that a distinction without a
20 difference? Clearly, there is money to be paid.

21 MR. KAMINETZKY: But it's extraordinarily -- going
22 back to your question, we are talking about personal
23 jurisdiction here. And for specific personal jurisdiction you
24 need three things, but two of which is it has to arise -- the
25 claim -- there has to be a strong connection, and I'm basically

1 quoting the Supreme Court -- between the claim and the activity
2 in question. Here, your Honor -- this is what's key. A
3 turnover action, what is it? Basically, turnover actions, as
4 your Honor knows, it's that we are holding money and rather
5 than give it to the person to whom we are holding money for,
6 give it to someone else.

7 What is the act of Clearstream in a turnover case?
8 It's the act of possessing property. This is very important
9 because Mr. Bonner's client, plaintiffs here, are only allowed
10 to assert a turnover claim against Clearstream. Pursuant to
11 the Peterson 1 settlement agreement, they released every other
12 claim. The only thing they are allowed to do is sue us as a
13 garnishee and holding money for someone else. So the act that
14 makes us a garnishee is possessing property, they allege, of
15 Bank Markazi. That possession always occurred in Luxembourg,
16 could not have occurred in New York by law, so that the claim
17 arises from our conduct solely in Luxembourg.

18 THE COURT: Counsel, I am having a great deal of
19 difficulty with that concept. Let me try a different way.

20 What if the bonds were payable in euros and
21 Clearstream took whatever -- you don't want me to use the word
22 took payment -- received the proceeds, but received the
23 proceeds in London or France. Let's just say France. The fact
24 that Clearstream has all of these activities in New York would
25 be wholly irrelevant to that, right? Because the activity,

1 which is the basis of the claim, would relate to those bonds,
2 the proceeds of which were payable in euros, in pounds. It has
3 nothing to do with New York. That's easy for you, right?

4 That's easy for me, right?

5 MR. KAMINETZKY: Yes.

6 THE COURT: That's not the case here. The proceeds
7 were payable in New York and New York only.

8 MR. KAMINETZKY: They were payable to Clearstream in
9 New York and that money could be used by law and was used for
10 anything Clearstream wanted to use it for. What happened in
11 Luxembourg --

12 THE COURT: It had to cough up the money to Markazi.

13 MR. KAMINETZKY: Your Honor, that's not just the
14 way -- the Second Circuit found that what happens in Luxembourg
15 is a book entry, and that's the only -- and that book entry is
16 what makes Clearstream liable or responsible to Ubae/Bank
17 Markazi, according to the allegations. That's just -- again,
18 the possession here of the property always took place in
19 Luxembourg.

20 THE COURT: But didn't the right to payment, which is
21 situated in Luxembourg, as the Court of Appeals has told us, a
22 direct result of the bond proceeds being deposited into
23 Clearstream's New York-based JP Morgan account? It's a direct
24 result.

25 MR. KAMINETZKY: I'm sorry? I didn't hear the last

1 thing your Honor said.

2 THE COURT: Let me start again. The right to payment,
3 which is situated in Luxembourg, is a direct result of the bond
4 proceeds being placed in Clearstream's JPM account here in New
5 York, right?

6 MR. KAMINETZKY: Correct. When money --

7 THE COURT: The book entry that you are talking about
8 could not have occurred without Clearstream's activity in New
9 York.

10 MR. KAMINETZKY: Without Clearstream receiving money
11 its own money in the JP Morgan account, it would not have or it
12 would have reversed a book entry in Luxembourg. That is
13 factually correct. But, again, not dispositive because there
14 has to be, again, under the Supreme Court's jurisprudence, a
15 substantial connection between the claim and the activity.

16 THE COURT: Well, the activity is Clearstream
17 receiving the proceeds of the bond in its New York JPM account
18 and then doing whatever bookkeeping it does to create the right
19 to payment to Markazi. These proceeds are the ones that
20 plaintiff wants. How can you say that the proceeds don't arise
21 out of that transaction in New York?

22 MR. KAMINETZKY: Because the claim here is turnover.
23 We are being sued as a garnishee. We are being sued saying
24 Clearstream -- we agree, it's not our money, right. We are
25 literally caught in the middle here. This is the kind of case

1 that's screaming for something called like an international
2 interpleader. We, Clearstream, have absolutely no interest in
3 holding onto this money at all. Our only interest -- and
4 Mr. Bonner dismissed this, and I want to come back to it, we
5 are facing literally catastrophic double liability because the
6 rules of the game have been changed for this specific case.

7 As garnishee, the only act that makes you a garnishee
8 is possessing property. We are possessing -- the property that
9 we possess has always been in Luxembourg, was never in New
10 York.

11 The proceeds your Honor keeps going to that were put
12 in the JP Morgan account are gone. And as Judge Forrest found
13 and the Second Circuit, they were gone 13 years ago. That
14 money has been -- was spent that night. What's in Luxembourg,
15 what's always been in Luxembourg is the book entry and that
16 property is in Luxembourg and it's always been Luxembourg. And
17 the claim arises out of our act of possessing Markazi's
18 property or allegedly Markazi's property in Luxembourg alone.
19 That's why this claim doesn't arise from our New York activity.
20 The New York activity was over 13 years ago.

21 THE COURT: So what? But it was necessary for you to
22 have that right to payment in Luxembourg.

23 MR. KAMINETZKY: Correct. But that is not enough of a
24 substantial connection, your Honor, and that's our argument, is
25 that because this is a turnover claim and not something else --

1 the only thing that makes you liable as a garnishee is
2 possessing. That possessing always happened in Luxembourg. It
3 could not have happened in New York.

4 THE COURT: Mr. Bonner, do you have a comment on this?

5 MR. BONNER: I think just very briefly, your Honor.

6 What the case law says with respect to minimum
7 contacts is that the claim has to arise out of or lead to
8 conduct in the forum.

9 Here, all of the things that we have just been talking
10 about make it quite clear that this claim does relate to
11 conduct that Clearstream undertook in the New York forum. Over
12 the course of many years it collected a huge amount of money
13 and there would be no asset in Luxembourg but for the fact that
14 that New York activity was undertaken. It's a bit of a
15 magical-thinking argument to try to eliminate all of that
16 activity that preceded the credit appearing in Luxembourg and
17 saying that that has nothing to do with the plaintiffs' claim.

18 I think the other element that's important to think
19 about, your Honor, when we talk about whether this claim arises
20 out of Clearstream's New York activity is that one of the
21 elements of the statute is that we have to show that
22 Clearstream is doing business in New York. That's a statutory
23 element of our claim. Of course, there is an enormous amount
24 of activity that Clearstream undertakes and undertook here in
25 New York that relate directly to our \$1.68 billion in Bank

1 Markazi bonds, but also other activity that Clearstream
2 undertakes in New York. And nobody, nobody has suggested
3 anywhere that there is a case that says that when an element of
4 a claim is satisfied by in-forum activity, such as Clearstream
5 undertaking its business operations here in New York, that that
6 doesn't satisfy the minimum contacts test.

7 THE COURT: Mr. Kaminetzky, why is that not right?

8 MR. KAMINETZKY: Your Honor, two things, or several
9 things.

10 No. 1 is 8772 is not a cause of action. 8772 takes
11 the cause of action and changes the rules and lowers the
12 standard and targets --

13 THE COURT: Speak to your Congress.

14 MR. KAMINETZKY: I understand. It's still a turnover
15 claim. Mr. Bonner can't say that because an element of a
16 statute says that Clearstream has to be doing business in the
17 United States, that changes the specific jurisdiction under the
18 due process clause. Mr. Bonner is certainly entitled to his --
19 not certainly. He is entitled to his own statute, but not his
20 own Constitution.

21 THE COURT: That's good. That's really good.

22 MR. KAMINETZKY: The statute can't mean that if you
23 are just doing business in New York, i.e., the general
24 jurisdiction standard, by the way, you are subject to specific
25 jurisdiction. If that remains that this is -- the bases for

1 jurisdiction here is specific jurisdiction and, therefore, it
2 must arise from.

3 Mr. Bonner talked about a but-for causation and that's
4 a very hot topic now. But at the end of the day there has to
5 be a substantial connection.

6 Your Honor, the fact that we receive bond proceeds
7 into the JP Morgan account, you know, that is a fact. Of
8 course, we did. That's what we do for a living. We receive
9 bond proceeds and we are a securities intermediary.

10 But the issue here is, where is the property? And the
11 property has always been in Luxembourg.

12 THE COURT: I am not sure how we are pronouncing it,
13 but I thought that the New York Court of Appeals in the *Licci*
14 case seems to have been pretty clear that CPLR 302(a)(1) in
15 doesn't require that every element of the cause of action
16 pleaded must relate to New York contacts. But if at least one
17 is, then that is sufficient.

18 Why is that not right, Mr. Kaminetzky?

19 MR. KAMINETZKY: It is exactly right, but, again, it's
20 a very simple -- coming back, I keep on saying it, this is
21 simply a turnover action. That's all it is. We are a
22 garnishee. We are saying, you had property at Markazi, turn it
23 over. The only element of a garnishee action or a turnover
24 action is, you possess property, full stop.

25 There is only one element and that element is

1 possessing property and that possessing and that property was
2 always in one place and that's Luxembourg. So that's the
3 answer.

4 THE COURT: The requirement for the substance of the
5 action, as opposed to personal jurisdiction. If you are doing
6 business, you said a minute ago that in 8772 Congress lowered
7 the standard and it made doing business in New York an element.
8 It's entitled to do that. And under 302(a)(1), if one of those
9 elements is present, then we have personal jurisdiction. Why
10 is that not right?

11 MR. KAMINETZKY: Because 8772 is not a claim. We are
12 not being sued under 8772. Mr. Bonner didn't amend the
13 complaint after 8772 was passed. Before 8772, this was a
14 turnover claim. After 8772, this was a turnover claim. What
15 8772 does is it strips defenses from us. It says, you used to
16 have a comity defense. You don't anymore.

17 THE COURT: Right.

18 MR. KAMINETZKY: If you change the rules of the game,
19 but the claim is still the claim is still the claim, and that's
20 just a turnover claim of property in our possession. Again,
21 the only element of a turnover claim is you possess property.
22 And if that's the only element, where did that occur? That
23 only occurred in Luxembourg.

24 THE COURT: One more question, please.

25 Both Markazi and Ubae argue that Markazi is the

beneficial owner of the right to payment. Indeed, the Peterson court thought so. You don't think that. Why is that? Are your cocounsel wrong?

MR. KAMINETZKY: They are certainly not my cocounsel. Codefendant.

As you heard, your Honor, we are in ferocious, fight-for-your-life-for-survival litigation with Bank Markazi in Luxembourg that will literally -- that could literally, in addition to what's happening here, bankrupt our company. We are fierce, fierce opponents, our codefendant in this case.

Here is the answer. The assets, as we talked about, are in Luxembourg. Even if New York law applies, which means that the UCC applies, article 8 of the UCC says very clearly in the choice-of-law provision that the law of the location of the securities intermediary applies, which is Luxembourg law.

So even if Mr. Bonner is right that New York law applies, it still takes you to article 8 that says, under New York law, Luxembourg law applies. And we set this out in our brief.

Under Luxembourg law, as set forth in the expert opinion or in the memorandum, which is Exhibit L to my declaration, there is no concept of beneficial ownership under Luxembourg law. Under Luxembourg law -- and, quite frankly, your Honor, Mr. Bonner had his own expert. If you read that expert report very carefully, she agrees that there is no

1 technical legal concept of beneficial or equitable ownership
2 under Luxembourg law. Under Luxembourg law, the only entity
3 that has a right to the assets sitting in that blocked account,
4 13675, is Ubae, not Bank Markazi. Therefore, under 8772, which
5 instructs this Court: Shall determine whether Iran holds
6 equitable title to or the beneficial interest in the assets.
7 The answer is no under Luxembourg law.

8 Let me take it one step further, your Honor. Even if
9 you ignore the UCC's choice of law. It says, under article 8
10 of the UCC -- what the whole purpose of article 8 of the UCC is
11 to set up this whole system of intermediaries, And article 8,
12 the entire point of it is that you only have a right to make a
13 claim against the intermediary on top of you. That means only
14 Ubae has a right to assert against Clearstream. Markazi has a
15 right against Ubae that it could pursue wherever and whenever
16 it wants, and Ubae has a right against Clearstream. You can't
17 skip and sue a securities intermediary two steps ahead of you.
18 We set out chapter and verse. I could read it to you. It's
19 chapter and verse in our brief.

20 THE COURT: Let me ask you this. Why is the Court not
21 able to take into account the contractual relationship between
22 Markazi and Ubae?

23 MR. KAMINETZKY: I think that there is a contractual
24 relationship between Markazi and Ubae that kind of proves the
25 point because what you have to determine is whether the

1 money -- again, we are talking about -- it's not really
2 money -- the property in account 13675, who is the beneficial
3 owner of that. The answer is Ubae.

4 That Ubae might have a separate contract that Markazi
5 could enforce against Ubae and say, listen, if you get that
6 money, you have to turn it over to us, that's fine.

7 But, again, the fact that they had to enter into a
8 separate contract proves that the only account holder of 13675,
9 the only one with rights, ownership of account 13675 can be
10 Ubae, which was with whom we were in privity with.

11 THE COURT: Again, why can the Court not take into
12 account that relationship?

13 MR. KAMINETZKY: Because that doesn't answer -- I am
14 not sure what you mean by take into account because that
15 relationship can't define, first of all, who is the owner of
16 the Clearstream account or the blocked account. Because the
17 only owner could be determined by -- whether it's Luxembourg
18 law, or the UCC, is Ubae, the account holder.

19 Your Honor, for example, let me just make a very kind
20 of simple example. I have an account in Bank of America. It
21 has a thousand dollars in it. It's in my name. But I owe
22 Mr. Bonner a thousand dollars and I say, Mr. Bonner, you know,
23 that money in the account, that's really yours. Mr. Bonner, if
24 he shows up to Bank of America and says, Kaminetzky said it's
25 my money, they would laugh him out of the bank, right?

1 THE COURT: I'll betcha Markazi and Ubae have more
2 than an oral, the money is yours.

3 MR. KAMINETZKY: Sure. Let's say they have a written
4 contract. But if the account is in my name, let's say I have a
5 written contract with Mr. Bonner, they are still not going to
6 turn the money over to Mr. Bonner because the account is in my
7 name. I only have to deal with my account holder and that's
8 the whole article 8 of the UCC.

9 THE COURT: I've got it.

10 Mr. Bonner, what do you say to that?

11 MR. BONNER: I'm glad Mr. Kaminetzky is using examples
12 where he owes me a thousand dollars.

13 Your Honor, this gets back to a point that we
14 discussed at the very beginning of our discussion this morning.
15 The Second Circuit has said that if we are going to determine
16 who the beneficial owner of the asset is, we go to the state or
17 the international law to determine what the rights and the
18 responsibilities are. That's the *Asia Pulp* case.

19 So the rights and responsibilities here, as your Honor
20 has suggested, you have to take into account what the
21 practicalities are of that situation. And here every single
22 economic right and benefit is owned by Bank Markazi at the end
23 of the day. Under federal law, it's the beneficial owner of
24 those assets.

25 Mr. Kaminetzky is trying to confuse things here with

1 talking about whether the concept of beneficial owner exists
2 under Luxembourg law. That's totally irrelevant under *Asia*
3 *Pulp*. The standard is the federal standard. Who is the
4 beneficial owner of these assets? When we take into
5 consideration the various rights and responsibilities, there is
6 only one answer to that question, your Honor. It's Markazi at
7 the end of the day. They are the only ones who have that
8 right.

9 THE COURT: Counsel, I know that because we see that
10 Markazi is the owner of the bond. How do I know that?

11 MR. BONNER: Yes, they are the owner of the bonds,
12 your Honor, and they are the ones that have the right. If this
13 litigation and all of the sanctions that are imposed upon Iran
14 were to go away tomorrow, who would end up with this money?
15 That's the question here, really, at a practical level. At the
16 end of the day, who is going to end up with this money? It's
17 not Banca Ubae. Ubae is not getting \$1.68 billion put to the
18 bottom line on its financial statements. Bank Markazi is.

19 As a result of that, they are what the statute says,
20 the beneficial owner of these proceeds, the right to payment,
21 whatever you want to term it, that's the bottom-line here and
22 that's the only way that the Second Circuit has told us that we
23 have to look at this.

24 THE COURT: One more quick question, please, for Mr.
25 Kaminetzky.

1 You aren't relying in any way on the separate-entity
2 rule here, are you, sir?

3 MR. KAMINETZKY: No, your Honor.

4 THE COURT: I knew that would be a short answer, but I
5 wanted to be sure. Thank you.

6 Mr. Kry, may I ask you about your argument that
7 Congress has, I think you said, robbed Markazi of a neutral
8 decision maker by amending Section 8772. You argue in your
9 brief that the statute singles out this case by name and docket
10 number and the assets that are at issue here and eliminates
11 some of Markazi's defenses. But the Supreme Court considered
12 all those arguments and found there was nothing wrong, right?

13 Why is that not the end of the discussion?

14 MR. KRY: Your Honor, I think there are two important
15 differences between this case and the one the Supreme Court
16 considered. The first one is that the legal claim was very
17 different. The prior Supreme Court case was a
18 separation-of-powers challenge. The due process rights with a
19 neutral decision maker simply wasn't at issue or argued at all
20 in that case.

21 The second point is that the relevant facts or at
22 least the focus of the facts is also quite different. In a
23 separation-of-powers context, the Supreme Court was only
24 examining what Congress did and the fact that Congress singled
25 out one particular case.

1 Here, in the due process context, it's similar to the
2 *Caperton* case where what the Court is examining is that one
3 party to litigation is manipulating the judicial process to get
4 a desired result, and so the focus is very much on plaintiffs
5 and their role in drafting this legislation, aggressively
6 lobbying Congress to enact it, and procuring the results that
7 as a litigant to the case. That's also a very different
8 factual focus.

9 THE COURT: Two issues.

10 Number one, you say manipulating the judicial process.
11 They are not manipulating the judicial process. They are
12 worked with the legislative process. And the question is, so
13 what? People do that every day of the week. That's why all
14 those lobbyists in Washington are paid all that money.

15 What's wrong with that? Where has the Supreme Court
16 ever said, just because you lobby for a statute it's unfair?

17 MR. KRY: What's quite unusual about this case is it's
18 not a situation where a party is lobbying because it wants a
19 general change in the law. It is a party to a specific pending
20 case that convinced and pressured Congress to enact a statute
21 that does nothing more than tell this Court how to rule on that
22 one specific case. So this is not ordinary-course lobbying.
23 It's quite different from that, your Honor.

24 THE COURT: How do we draw the line?

25 MR. KRY: I think it is the confluence of the facts

1 that, on the one hand, this wasn't something Congress enacted
2 on its own initiative. One of the parties to the --

3 THE COURT: Who cares?

4 MR. KRY: Under *Caperton*, your Honor, the due process
5 claim arises because one of the parties to the lawsuit is going
6 about and taking extraordinary steps to change the result in
7 the case. So that's not an extraneous fact. That's an
8 important ingredient to the due-process claim. Also, it's not
9 like lobbying for some general change in the law that's going
10 to --

11 THE COURT: What about the very weighty interest of
12 the United States in seeing that Iran pays for the injuries
13 that its terrorism has caused? How do we weigh that? It's not
14 a private interest at stake here.

15 MR. KRY: Your Honor, I don't think it figures into
16 the due-process claim because Congress can enact statutes of
17 general application. Those are not bound up with this
18 due-process claim.

19 What makes this claim problematic from a due-process
20 perspective is, you have one of the litigants to the case
21 writing the law, aggressively lobbying Congress to enact it,
22 and the law does nothing more than tell the Court how to
23 resolve this one case. This is not normal lobbying and it's
24 not normal legislation.

25 THE COURT: You are telling me that the law tells the

1 Court how to decide the case and, indeed, you've argued
2 findings that the Court is required to make are really nothing
3 of the sort, they are just make ways, whether Markazi has a
4 beneficial interest and nobody else does. Yet, here you are
5 scrapping about whether or not Markazi had a beneficial
6 interest. That's not a foregone conclusion, or at least you
7 people don't think it is.

8 MR. KRY: Clearstream had a different view, but we
9 believe it's a foregone conclusion. We have been telling the
10 New York courts for I don't know how many years. We have been
11 telling the Luxembourg courts for many, many years now that
12 Bank Markazi is the beneficial interest holder of these assets,
13 and Congress and plaintiffs were well aware that that has been
14 Bank Markazi's position all along. And so to say that that's
15 not a foregone conclusion, I just think, disregards that
16 reality, your Honor.

17 THE COURT: The reality I have to deal with is that
18 you people are fighting about it.

19 Mr. Bonner, do you want to add anything to this?

20 MR. BONNER: I think, your Honor, as you suggested,
21 the Court in Bank Markazi decided this issue. It's the very
22 same premise that Bank Markazi is now advancing that it was
23 advancing in the last case. That's that this has been decided.

24 As your Honor just suggested, there are open issues
25 here. There are certain elements of the claim that we have to

1 prove. As a result, the previous Bank Markazi litigation from
2 the Supreme Court disposes of this argument.

3 I think also, just to follow up on some comments that
4 were made by your Honor, there is absolutely nothing wrong or
5 unusual about lobbying at all. In fact, the Supreme Court in
6 the case that we cited, the *Eastern Railroad Conference* case,
7 made this very point, that parties often go to Congress and try
8 to lobby in favor of legislation that hurts them and harms
9 their opponents, and the Court said, there is absolutely
10 nothing wrong with that. In fact, it's well within people's
11 First Amendment right to go to Congress and to lobby about
12 those types of issues.

13 To me, this case has nothing to do even remotely
14 similar to the *Caperton* case that Bank Markazi cites. There
15 was \$3 million, I believe, paid to a judge right before a
16 decision was made. Here we have a mutual arbiter, your Honor,
17 to make the decisions about whether we satisfy the various
18 elements of the statute. So this argument is certainly not
19 something that should trouble the Court at all.

20 THE COURT: Mr. Kry, can I just ask you again, is
21 there anything else you want to say about the idea that Markazi
22 is the beneficial owner? You heard what Mr. Kaminetzky said.
23 Do you have anything else to say on that?

24 MR. KRY: Only that we disagree with him, your Honor,
25 that under Luxembourg law, under United States law, Bank

1 Markazi has been telling the courts here and there for many
2 years now that Bank Markazi is the ultimate beneficial interest
3 holder in these assets, so we just respectfully disagree with
4 Clearstream on that position.

5 THE COURT: Do you agree with Mr. Bonner that the
6 reason we know that is that Markazi is the owner of the bonds?

7 MR. KRY: Well, not quite, your Honor, because I
8 believe Ubae is maybe the legal titleholder of the bonds.

9 THE COURT: That's my question. You heard what Mr.
10 Kaminetzky said about Ubae being the account holder. How do
11 you get around that to say that Markazi is the beneficial
12 owner?

13 MR. KRY: That's the distinction between beneficial
14 ownership and legal ownership. The concept is that we are the
15 economic beneficiary of the relationship amongst Clearstream,
16 Ubae, and Bank Markazi here, but we are a beneficial interest
17 holder because the result of that structure is that we have the
18 beneficial economic interest in the ownership.

19 THE COURT: Again, tell me precisely how I know that
20 for purposes of our motions.

21 MR. KRY: I think the clearest point of reference for
22 that is simply what the Court held the last time around. This
23 same issue was litigated all the way up in the Peterson 1 case,
24 and the result of the determination there was that this
25 statutory element was satisfied, and there is simply, in our

view, not a basis for a different result here, whether you look at it under Luxembourg law or under New York law and the UCC. The economic benefits of this ownership are ultimately vested in Bank Markazi, even though Ubae may be the legal titleholder of the bond, and I'm sure Bank Markazi's Luxembourg counsel can give a much longer explanation about why that's also correct under Luxembourg law, but I will just say now that that argument has been made consistently there.

THE COURT: Let me ask you this. If Ubae is the owner of the bonds, how can Clearstream say it could do whatever it wanted to with the proceeds from the JPM account? Remember counsel kept saying, Clearstream took its money. How can that be if Ubae is the owner of the bonds?

MR. KRY: In terms of the bonds that are held in Luxembourg, Ubae is the legal owner of those and we are the beneficial interest holder in those. To the extent the relationships among the parties impose obligations of control or agency that may restrict the parties' rights to do things amongst themselves, that's a separate question.

But I think for beneficial interest, which is the only standard Section 8772 imposes, our view is that that statutory standard is clearly met. It was designed to be met. Plaintiffs wrote the statute so it would be met because there is simply no genuine dispute that at the end of the day the economic benefits of these bonds, by design, flow to Bank

1 Markazi. That's what the courts held all the way up to the
2 Supreme Court in the Peterson 1 litigation, and there is just
3 no reason to reach a different result here. We have
4 consistently taken the position here and in Luxembourg that
5 Bank Markazi is the beneficial interest owner in these assets.

6 THE COURT: Mr. Kaminetzky, I suspect you disagree, is
7 that right?

8 MR. KAMINETZKY: Indeed, I do disagree.

9 First of all, Peterson 1 and Peterson 2, which we are
10 Peterson 2., Peterson 1, as your Honor knows, there is an
11 extraordinarily important difference. There, the Court found
12 that there was a pot of money sitting in New York in a city
13 account. Here, the Court has held exactly the opposite, it's
14 sitting in Luxembourg. Again, it just goes back -- it goes
15 back to the difference between when people talk loosely and a
16 legal finding.

17 Back to my example of owing Mr. Bonner money,
18 Mr. Bonner might say, that thousand dollars in Kaminetzky's
19 account, I own it, I'm the beneficial owner of it because he
20 owes me a thousand bucks. That's fine to talk about it in that
21 way, but you have to determine -- under 8772, your Honor has to
22 make a legal finding who is the beneficial owner of the
23 entitlements in 13675. The answer there is only Ubae. That
24 Ubae might then, in turn, owe some obligation or deobligation
25 to Bank Markazi is just simply not relevant to the legal

1 question of who is the beneficial owner of 13675.

2 THE COURT: But you just heard Mr. Kry say to me that
3 I have to take into account the totality of the circumstances
4 and all of the relationships, including the relationship
5 between Ubae and Markazi. Why is he wrong?

6 MR. KAMINETZKY: Because he just made that up.
7 Because at the end of the day -- again, imagine if you had come
8 to Bank of America or Mr. Bonner would come to Bank of America
9 and say, Bank of America, I know this account says Kaminetzky
10 on it. But Bank of America, you should take into account the
11 totality of the circumstances, that Kaminetzky owes me a
12 thousand dollars and, please, I'm the beneficial owner, so I
13 have some rights.

14 My point is, Mr. Bonner -- the day I owed a thousand
15 dollars to Mr. Bonner didn't change anything about the nature
16 of the property sitting in my account. The day before I owed
17 him a thousand dollars, it was mine. The day after, it's mine.
18 That Mr. Bonner now has -- that I now have a separate
19 obligation that corresponds to this money just simply doesn't
20 change the property nature of the accounts in Bank of America.

21 THE COURT: I get your point on the proceeds of the
22 blocked account. That's easy. How can we ignore the reality
23 that Markazi is the owner of the bonds?

24 MR. KAMINETZKY: There are no bonds, your Honor.

25 THE COURT: The owner of the proceeds.

1 MR. KAMINETZKY: Again, the proceeds are only as a
2 result. Many, many years ago there were bonds. Those bonds,
3 they spin off interest payments and matured. That turned into
4 money that went into the JP Morgan account. And then that
5 money was used for whatever purpose Clearstream used it, and
6 then there were book entries in Luxembourg. There are no
7 bonds. The bonds were gone 13 years ago.

8 THE COURT: I don't think anyone disputes that Markazi
9 was the owner of the bonds and, thus, ultimately entitled to
10 receive the proceeds. The allegation is, in the conspiracy
11 theory, that Markazi and Ubae decided that they would add an
12 extra level so that Clearstream could hide to whom the proceeds
13 were going. How can that be ignored in determining who is the
14 beneficial owner?

15 MR. KAMINETZKY: Because stakeholder of the bond is a
16 bit loose.

17 What we have here is securities entitlements. No one
18 really owns bonds anymore. There is like a global note held
19 somewhere.

20 What the story of this case is is that Markazi had an
21 account with Clearstream that held various securities
22 entitlements. Clearstream then decided, on its own, pursuant
23 to, you wanted to make the U.S. happy, and decided to kick
24 Markazi out of the bank and said take your stuff, we don't want
25 you as a company anymore.

1 So Markazi, according to the story, what they did is,
2 Ubae agreed to what they call nest the assets, take them under
3 their name. And they then withhold them for Markazi, as you
4 say, like to shield. On our books and records it was a Ubae
5 account. The bonds -- as you would call it, the bonds, the
6 securities entitlements were transferred from Markazi's account
7 to Ubae's account. At that point they were no longer -- as to
8 Clearstream, they were no longer Markazi's bonds, if you will.
9 They were Ubae, the holder of the account. We had an account.
10 Then later on we understood, we were told, we got wind of what
11 happened, that although the account says Ubae, it's really Bank
12 Markazi. We then blocked the account.

13 Again, the point here is that it transferred. There
14 was a transfer of assets from Markazi to Ubae. They had a side
15 deal going on. But in terms of us, in terms of Clearstream,
16 including the account holder, again, Mr. Bonner holds an
17 account in Bank of America and then he transfers the money to
18 me and now it's the Kaminetzky account, right? Vis-a-vis Bank
19 of America, it's now my money. Mr. Bonner no longer has any --

20 THE COURT: Isn't it different here because, as you
21 put it, the story of the case informs us that at the end of the
22 day it's Markazi who is going to get the dough if and when
23 released?

24 MR. KAMINETZKY: That's pursuant to an agreement.
25 That has nothing to do with who is the -- your Honor, the

1 word --

2 THE COURT: Clearstream must have had some inkling of
3 that when it up and blocked the account. If it thought that,
4 oh, my goodness, I guess they sold these security entitlements
5 to Ubae, nothing would have happened. But even Clearstream was
6 recognizing what Mr. Bonner says is the reality of the
7 situation.

8 MR. KAMINETZKY: What we recognize, your Honor, it's
9 two completely separate things. We recognize -- we blocked the
10 account because we recognize that something shady went on and
11 that this is still Markazi's money. We don't want to do
12 something that benefits Markazi because we don't want to
13 provide a service, which is like what the sanctions say to
14 Markazi is a completely different question than whose property
15 it belongs to from whose property it is. It's two different
16 questions.

17 We understood that Markazi was behind this or that
18 Ubae schemed with Markazi. We blocked the asset. Not because
19 it changed who is the owner of the property. It's still a Ubae
20 account. It's just that we don't appreciate when people do
21 things like nest assets because, again, sanctions law has
22 nothing to do with property law. If you provide a service to
23 Iran, if you do help Iran, you are in violation of sanctions.
24 That's a completely different question than your Honor has to
25 answer of whose property is sitting in 13675.

1 THE COURT: Thank you.

2 Mr. Bonner, what do you say?

3 MR. BONNER: I think the best answer to this issue is
4 something that Mr. Kaminetzky just said. He said something
5 shady went on and this is still Markazi's money. That's a
6 quote. I wrote that one down. That's exactly what happened
7 here. The beneficial owner is Bank Markazi.

8 I think what Mr. Kry was talking about earlier is the
9 difference between title ownership and beneficial ownership.
10 Mr. Kaminetzky wants to talk to us about title, title, title,
11 title, title. That doesn't matter here. What matters is what
12 the statute says, and the statute says beneficial ownership is
13 what matters. It's quite clear that these assets belong to
14 Bank Markazi, so that answers the question, your Honor.

15 THE COURT: I will apologize if I've asked you this
16 five times already. How do I know that?

17 MR. BONNER: You know that because all of the rights
18 to these assets belong to Bank Markazi. And then the second
19 step of the analysis, we go back to the federal law and we say,
20 look at all these rights. And what Mr. Kaminetzky just
21 admitted, it's Markazi's money, so those are the rights.
22 Markazi has all the rights to the money to collect the bond
23 proceeds, to use them as they want. Then the federal statute,
24 8772, says, under federal law, does that constitute beneficial
25 ownership.

1 THE COURT: How do I know that? How do I know that
2 Markazi has the rights to the proceeds, etc., etc.?

3 MR. BONNER: There is a contract between Bank Markazi
4 and Ubae. Ubae agreed to adhere to all of the requirements of
5 the initial Bank Markazi/Clearstream account agreement. And so
6 these assets are being held in an account right now in the name
7 of Ubae, and Ubae has an obligation to pay everything over to
8 Bank Markazi. So that's how we know that, your Honor.

9 THE COURT: Thank you.

10 Mr. Colella, can it be your turn now.

11 MR. COLELLA: Sure, your Honor.

12 THE COURT: You've argued about the various time
13 periods here, about when Ubae took certain actions, when the
14 plaintiffs obtained their judgments and registered their
15 judgments and everything.

16 What do you make of the plaintiffs' arguments that
17 CPLR 276 is applicable to the judgment holder claims and
18 provides that "every conveyance made" with intent to "hinder,
19 delay, or defraud either present or future creditors is
20 fraudulent as to both present and future creditors."

21 Why are not plaintiffs those future creditors?

22 MR. COLELLA: Your Honor, they could be future
23 creditors. But the issue here is not whether they stated a
24 claim under 276(a). The issue here is personal jurisdiction,
25 and that's the big difference.

1 When you are looking at this from the concept of
2 personal jurisdiction, as we pointed out, there has to be harm
3 in the forum at the time Ubae took action. And there are two
4 sets of actions here that the plaintiffs have identified.

5 The first set was from January to March of '08, when
6 the bonds were transferred from Markazi's account into Ubae's
7 customer account on which we were holding them for Bank
8 Markazi. At that time there could never have been harm in New
9 York, there could never have been purposely directed activity
10 in New York because there were no judgments in New York.

11 THE COURT: Where is it written that there is some
12 requirement of contemporaneousness? And doesn't 276
13 specifically address that by talking about future creditors?

14 MR. COLELLA: 276 is not the long arm statute and it's
15 not a personal jurisdiction statute. And we are relying on the
16 Supreme Court's decision in *Bristol*, which required injury in
17 the forum.

18 THE COURT: I have seen cases requiring that for
19 specific jurisdiction. And what do you say about the agency
20 argument made by the Peterson plaintiffs?

21 MR. COLELLA: Your Honor, I want to return to that
22 because you mentioned it. The agency argument is -- it
23 addresses really the second set of conduct, which is what you
24 all spent a lot of time talking about. Those are the transfers
25 from July '08 to October 2012, which involved the sundry

1 account. There has been a lot said about the sundry account,
2 and I think you said it, and we would agree with you.

3 The sundry account was not opened by Ubae. The sundry
4 account is a different account number, as Mr. Kaminetzky has
5 pointed out. It's 13675. Ubae's account is 13061, the
6 customer account. That money is not in the customer account.
7 I think it's undisputed that Clearstream opened that account
8 solely on its own. How in the world is that an agency
9 situation?

10 And I will say, one of the things we haven't talked
11 about is the Second Circuit's holding twice that confirms the
12 point. And the Second Circuit said that -- I'm just reading
13 it. Neither Markazi nor Ubae possesses any assets subject to
14 turnover because the asset at issue is in fact held by
15 Clearstream and represented as a positive account balance in
16 the sundry blocked account to which neither Markazi nor Ubae
17 has access. If we don't have access to the account, how can we
18 possibly have control over Clearstream with respect to that
19 account.

20 That's why the plaintiffs, neither Havlish nor
21 Peterson 2, argue that we did anything directly in the United
22 States. Their entire theory, I think as you are pointing out,
23 is agency or conspiracy.

24 THE COURT: Absolutely. But the point is that in
25 establishing the banking relationship and executing the various

1 agreements with Clearstream, you authorized Clearstream to do
2 what they had to do in order to collect these proceeds. And
3 I'll bet -- I haven't yet gone back to look, but I'll bet that
4 they get to do whatever they are supposed to do, according to
5 law. And you heard Mr. Kaminetzky argue that the reason they
6 set up the blocked account was because the law required them to
7 do that. They don't need you to tell them they can do that,
8 right?

9 MR. COLELLA: That's correct. And that's actually our
10 point. The terms and conditions refer to account No. 13061.
11 There are no terms and conditions with respect to 13675.
12 That's exactly our point. Clearstream took action unilaterally
13 and on it's own and has controlled the accounts to this day.

14 THE COURT: As required by law.

15 MR. COLELLA: That doesn't connect -- I'm sorry, your
16 Honor. Go ahead.

17 THE COURT: They don't need your permission to do what
18 they are required to do by law. But the way the entitlements
19 got there in the first place was through the terms and
20 conditions and, therefore, they are your agent and everything
21 they did in New York you did in New York.

22 MR. COLELLA: But agency requires control. And even
23 if you accept Mr. Bonner's argument, a little bit of control,
24 we had none. The Second Circuit said it twice and it's never
25 been challenged. So that's where their argument fails, in our

1 opinion, on agency and on conspiracy. We need some control.

2 We never had it.

3 THE COURT: On conspiracy, though, the allegations in
4 the complaint are that you made these agreements with
5 Clearstream and Markazi in order, essentially, to defraud the
6 plaintiffs. Why isn't that sufficient?

7 MR. COLELLA: Because control is an element, and we
8 pointed this out in one of the cases that we cited. But we
9 also disputed factually whether we knew about the judgments.
10 That's an essential element. If we didn't know anything about
11 the judgments, then there couldn't have been a conspiracy to
12 hide assets from the plaintiffs.

13 Again, this conspiracy supposedly happened in January
14 to March of 2008, so there were no judgments in New York. So
15 how can that activity had been directed at New York? The
16 Peterson plaintiffs had a judgment in D.C. in September 2007.
17 If there was a conspiracy in March 2008, one could argue that
18 it was directed at D.C., which is where they had the judgment.
19 The due-process clause doesn't require clairvoyance.

20 THE COURT: Also, the whole idea of the effort to hide
21 the payments doesn't really necessitate there being a judgment,
22 does it?

23 MR. COLELLA: The time period you are talking about,
24 your Honor, the payments were from July of '08 to October of
25 2012. There was no hiding. They were under lockdown pursuant

1 to court order.

2 Ubae did nothing at all, period, from June 2008
3 forward, and so that's our principal argument. Again, there
4 was nothing hidden because they were -- there was a court order
5 locking them down in the U.S.

6 THE COURT: I thought that the plaintiffs' argument is
7 that your agent, Clearstream, did, took actions?

8 MR. COLELLA: Well, they took actions to lock the
9 account without our knowledge or consent until after it
10 happened. That's the bottom line.

11 THE COURT: I am going to ask Mr. Bonner in a minute
12 what he thinks, but I wanted to ask you one more thing on the
13 harm in the forum.

14 What do you make to plaintiffs' allegations that New
15 York plaintiffs were injured in their complaint? Why is that
16 not sufficient?

17 MR. COLELLA: This isn't a personal injury action.
18 Unlike *Bristol*, where it's easy to say, well, you took a drug
19 and you got hurt somewhere, that's not the case here. This is
20 a judgment collection action and that's why it's unique, your
21 Honor. It's a unique issue.

22 Because the injury -- again, to repeat, the injury can
23 only occur when you have standing as a judgment creditor, and
24 they didn't have that in New York until March 24, 2008, at the
25 earliest.

1 I'll also say, there is no evidence in the record
2 about -- there is a lot of groups of plaintiffs about who
3 actually was a resident of New York. But, again, that doesn't
4 matter. It wouldn't matter because they weren't judgment
5 holders at the time.

6 THE COURT: Mr. Bonner, what do you say?

7 MR. BONNER: I think, first of all, most importantly,
8 your Honor, this idea that Bristol-Myers sets up a requirement
9 that there be an injury that's suffered in the forum is totally
10 incorrect. There is nothing in the opinion that says that.
11 It's contrary to any number of cases which have held that only
12 one element of your claim has to be tied to the in-forum
13 conduct in order for there to be a basis for minimum contacts
14 jurisdiction.

15 We take, for example, the *Licci* case, which your Honor
16 referred to earlier. Money passed through the United States,
17 went overseas to Lebanon. Bombs were then flown over the
18 Lebanese border to Israel. The plaintiffs were injured in
19 Israel. But the Court found that there was personal
20 jurisdiction in those circumstances.

21 What the court said in *Bristol-Myers* was that if there
22 is no injury in the forum and there is no in-forum conduct that
23 is taken, then you don't have minimum contacts, you don't have
24 personal jurisdiction. But this purported requirement under
25 *Bristol-Myers* that there be an injury in the forum, it's just

1 made up out of whole clothe and it's totally consistent with
2 cases like *Licci* that the Second Circuit and other courts
3 continue to cite as a leading personal jurisdiction case.

4 THE COURT: Let me ask Mr. Mitchell. I take it you
5 agree with Mr. Bonner on this?

6 MR. MITCHELL: We do. And we also agree with your
7 earlier comments, your Honor, that CPLR 276 makes it pretty
8 clear that future creditors have status to claim harm from a
9 fraudulent transfer, even before they have a judgment. I think
10 we have cited a number of cases from New York courts affirming
11 that principle.

12 THE COURT: Let me ask you this. How do we know that
13 there are New York resident plaintiffs, and how many? Can you
14 give me any more information on that, please.

15 MR. MITCHELL: I would have to calculate that for you.
16 I know we have more than 10 or 20 who are New York resident
17 plaintiffs since most of the claimants who make up the Havlish
18 and Hoagland plaintiffs were killed in the Twin Towers attacks
19 on 9/11. So the majority of people will at the time have been
20 New York residents.

21 But I think also it's important to remember, they were
22 pursuing claims in a New York court that was going to result in
23 a New York judgment. If we look at the law governing the situs
24 of injury, then what we have is, we have a situs of injury in
25 New York because as New York law suggests, that when a debtor

1 takes action or a third party takes action to impede the
2 collection of the New York judgment, then for purposes of
3 personal jurisdiction that is sufficient to confer jurisdiction
4 under 302(a)(3) and it also satisfies the due process concerns.

5 THE COURT: What do you make of the argument that Ubae
6 took steps to prevent the plaintiffs from enforcing their
7 judgment? Let me do it a different way. How did Ubae take
8 steps to prevent the plaintiff from enforcing their judgments
9 in 2008 when they didn't receive the judgment until later? Is
10 that a 276 answer, or what?

11 MR. MITCHELL: I think it's a 276 answer from a legal
12 framework. If we turn back to the factual framework, we could
13 just repeat all of the discussion we have been having about
14 Ubae's participation and conspiracy.

15 The fact that we have alleged very directly that Ubae
16 entered into that conspiracy, with the purpose of helping
17 Markazi conceal these assets from judgment holders in New York
18 and, in our case, those that were coming and who would have
19 judgments, and they did it so that those New York judgment
20 holders would be impeded in their ability to enforce their
21 judgments.

22 THE COURT: They have them yet.

23 MR. MITCHELL: They didn't have them yet, but Section
24 276 gives them that claim and it gives them that right to
25 pursue those assets.

1 THE COURT: What do you say about counsel's argument
2 that the statute doesn't require them to be clairvoyant and to
3 know the judgments would be entered years later?

4 MR. MITCHELL: First of all, I think we can say that
5 these claims were pending at the time that the transfers were
6 made. We have laid out in our brief and in the complaint a
7 number of factors that demonstrate the urgency that Markazi had
8 to conceal its ownership of the assets, everything from
9 judgment creditors who are already pursuing Markazi's assets,
10 to OFAC, which was working with Clearstream to cut off
11 Markazi's assets to the U.S. financial and banking system.

12 And it specifically, because of the services that
13 Clearstream was providing to Markazi with respect to these
14 bonds, the fact that the FSIA was in the process of being
15 amended and in fact had been approved by Congress and then
16 signed by the president in the immediate timeframe of these
17 transfers, that that amendment to the FSIA made it more
18 possible and easier and more direct for judgment holders to
19 pursue those assets.

20 The fact that the Havlish plaintiffs had a default
21 entered against Markazi prior to those transfers, and as the
22 legislation was being enacted by Congress and the president,
23 and the fact that the transfers -- what they ended up doing and
24 what Ubae's role was was to, as has been discussed, to step
25 into the chain of ownership between Clearstream and Markazi to

1 create an additional layer so that as these 62 payments
2 Mr. Bonner spoke of worked through the U.S. and New York
3 banking systems, Markazi's ownership of those assets would not
4 be identified. Instead, they would appear to be related to
5 Ubae.

6 THE COURT: Who wants to comment on that?

7 MR. COLELLA: Your Honor, just a couple of points.

8 The Hoagland plaintiffs hadn't filed a lawsuit at the
9 time that these transfers occurred in 2008. One of the things
10 that we are trying to convey to the Court here is this idea
11 that there is personal jurisdiction in New York because of some
12 hypothetical future event would take due process beyond all
13 recognizability.

14 THE COURT: In light of 276 and, I think, Mr.
15 Kaminetzky's words, that this was something shady.

16 MR. COLELLA: Whether it's shady or not, we obviously
17 fundamentally disagree with that. The Clearstream settlement
18 with OFAC tells the story that they knew everything was going
19 on. That's a side point. We would disagree with that.

20 The fact of the matter is, the transfers happened and
21 there could have been no purposely directed activity in New
22 York at the time. It's only hypothetical.

23 276, again, is not a personal jurisdiction statute,
24 and it is state law and it's certainly subject to federal due
25 process. That's our point, that you need harm in the forum

1 Just to address Mr. Bonner's point, we are not making
2 it up. We have quoted *Bristol* all through our briefs. You can
3 see for yourself that injury is a requirement. *Bristol*
4 postdates *Licci*, so to the extent *Licci* says anything
5 inconsistent, we would say that it's no longer good law, in
6 light of *Bristol*.

7 THE COURT: Why do you say *Licci* is no longer good
8 law?

9 MR. COLELLA: On this issue of injury and forum.

10 THE COURT: Like I said, I don't believe there is any
11 case that says that.

12 MR. COLELLA: Because it probably hasn't come up.
13 *Bristol* was decided in '17, so it's fairly recent.

14 THE COURT: Anybody else want to comment?

15 MR. MITCHELL: Your Honor, if I could respond to
16 Mr. Colella's assertions concerning the Hoagland plaintiffs.

17 It is true, they had not filed their complaint in
18 2008. However, when you look, as we have discussed, at Section
19 276, applying to future creditors, and you look at the law that
20 has interpreted that statute, you only need the third party and
21 the debtor only need to be generally available of a class of
22 plaintiffs who could make a claim. The 9/11 --

23 THE COURT: Generally aware of a class of plaintiffs?

24 MR. MITCHELL: Yes. They don't have to be
25 specifically aware. They just have to know claims are coming.

1 THE COURT: The only reason I say that, counsel, I
2 think you misspoke. I think you said they have to be generally
3 available of claims.

4 MR. MITCHELL: No. Excuse me. I meant to say
5 generally aware.

6 The 9/11 multidistrict litigation in New York had been
7 pending since 2002 or 2003. It was very, very clear to Markazi
8 in 2008, it was very, very clear to Ubae in 2008, and it was
9 very, very clear to Clearstream in 2008 that there were many,
10 many plaintiffs who would be filing claims against Markazi and
11 Iran for their role in 9/11 and who would be pursuing
12 enforcement of any judgments in New York.

13 So the Hoagland plaintiffs easily fall within that
14 class of plaintiffs who had claims against Iran that would be
15 within the scope of Section 276.

16 THE COURT: Yes, sir.

17 Anybody else?

18 MR. COLELLA: Last thing, your Honor. There is a
19 dispute on whether we knew about the litigation. We said we
20 didn't know about the litigation. If that's an issue, that
21 would be subject to jurisdictional discovery. Again, I'll
22 reiterate, the jurisdictional theory that Mr. Mitchell is
23 promoting is breathtakingly limitless.

24 THE COURT: For today's purposes, though, is it not
25 sufficient to rely on what he says in the complaint?

1 MR. COLELLA: Well, in terms of what he says about our
2 knowledge, he just says defendants know. There is no specific
3 allegation as to Ubae, and that's improper pleading.

4 MR. MITCHELL: Your Honor, if I might, if you look at
5 paragraph 73 of our complaint, where we lay out in some detail
6 Ubae's knowledge, we are not alleging defendants in general.
7 We specifically speak to Ubae's knowledge, intent, and purpose.
8 And then in other parts of the complaint we also refer to
9 Ubae's participation in the conspiracy, specifically for the
10 purpose of concealing these assets.

11 THE COURT: Counsel, have we exhausted ourselves?

12 MR. KRY: Your Honor, if the Court will indulge me,
13 there is an issue of subject matter jurisdiction that hasn't
14 come up at all today, but I do think it is a quite substantial
15 issue. If you permit a few minutes' argument on that, I think
16 it is something that needs to be covered.

17 THE COURT: Go ahead.

18 MR. KRY: The plaintiffs in our case are making two
19 different requests. One is to seize Bank Markazi's property in
20 Luxembourg, but they also have a demand for an order against
21 Bank Markazi directing Bank Markazi to transfer those assets.
22 And that order and that request implicates an entirely
23 different immunity, which is Bank Markazi's jurisdictional
24 immunity, so they need a separate basis for doing that.

25 Section 1330 doesn't create jurisdiction to do that

1 because that provision only applies when there is an immunity
2 exception under Section 1605 to Section 1607.

3 And Section 8772 doesn't create that jurisdiction
4 either because that statute is entirely about property. When
5 you read that statute it says that property shall be subject to
6 execution, attachment, or transfer orders, notwithstanding
7 sovereign immunity. It does not say one word about ordering
8 the sovereign itself to move its property around.

9 Finally, ancillary jurisdiction doesn't apply here
10 either because the Supreme Court has been clear that ancillary
11 jurisdiction let's you go after the defendants' property. It
12 does not let you assert new claims against different
13 defendants. And Bank Markazi was not a party to this judgment.

14 *Weinstein* is the case that the plaintiffs primarily
15 rely on here, but it's fundamentally different. That was about
16 real estate, that the district court had appointed a receiver
17 to distribute real estate in New York. Nobody was trying to
18 order the sovereign to transfer property or do anything else in
19 that case, so *Weinstein* simply doesn't reach that far. You
20 need separate jurisdiction if you are going to enter an *in*
21 *personam* order against a foreign sovereign, and that hasn't
22 been shown here.

23 Your Honor, I would also, just to clarify the record
24 on this, although Havlish counsel is here, I don't represent
25 Bank Markazi in the Havlish case. I understand the Court

1 combined the two hearings just because there was a motion
2 brought by Ubae. But I didn't want any silence on my part to
3 be held against Bank Markazi, and my client reserves all of its
4 rights in connection with that case.

5 THE COURT: Thank you.

6 Mr. Bonner, do you want to talk about *Weinstein*?

7 MR. BONNER: Yes, your Honor. Just generally about
8 this issue about subject matter jurisdiction over Bank Markazi.

9 Again, the *Rubin* and *Weinstein* both say that a
10 notwithstanding clause that's as broad as the one that we have
11 in this case creates an independent basis for subject matter
12 jurisdiction. If we look at *Weinstein*, I know it's very boring
13 to have something read here, but it's really on point, your
14 Honor.

15 It rejected the argument that Bank Melli, which is
16 another instrumentality of Iran named in that case -- it
17 said -- it rejected the argument that TRIA does not provide an
18 independent basis for jurisdiction over an instrumentality of a
19 sovereign state when the instrumentality was not itself a party
20 to the underlying tort action.

21 They don't need to have been a party to the underlying
22 tort action. There is subject matter jurisdiction over this
23 case. The arguments that Mr. Kry is making have to do with *in*
24 *personam* jurisdiction, has nothing at all whatsoever to do with
25 subject matter jurisdiction, which the Court obviously has here

1 by virtue of that notwithstanding clause.

2 THE COURT: Mr. Kry.

3 MR. KRY: The notwithstanding clause says that the
4 Court can order execution attachments or transfer against the
5 property, notwithstanding sovereign immunity. It doesn't say
6 one thing about ordering the sovereign entity itself to take
7 some action. Those are completely different questions and
8 *Weinstein* just didn't address this issue at all because that
9 case was only about operating against the property. It was in
10 rem jurisdiction over real estate in New York that the Court
11 wanted to appoint --

12 THE COURT: Got it.

13 MR. KRY: Fundamentally different issue, your Honor.

14 THE COURT: I think Mr. Bonner is asking for the
15 transfers. I don't think it's asking the sovereign to bring
16 its property back but wanting to, for example, order
17 Clearstream to do it.

18 MR. KRY: That's a separate question. But I believe
19 in the complaint they had asked for relief against Bank Markazi
20 *in personam*. My point is *Weinstein* doesn't authorize that.

21 THE COURT: Anybody else?

22 MR. KAMINETZKY: Your Honor, if I can make two very
23 brief points that we didn't touch on yet.

24 No. 1 is, there is a third due process requirement for
25 finding specific jurisdiction and that's the exercise of

jurisdiction is not reasonable under the circumstance.

Your Honor, it's hard to think of a more textbook case of how unreasonable personal jurisdiction or specific personal jurisdiction would be in this case vis-a-vis Clearstream. Literally -- I could go through the factors, but Mr. Bonner talked about this and poo-pooed it before.

But we, Clearstream, are a Luxembourgish company. This is a case that has to do with Luxembourgish assets held by a foreign client. The exercise of jurisdiction here could not be more unreasonable, as we are facing literally catastrophic double liability. As you heard --

THE COURT: That doesn't have anything to do with it. The point is, you have an office in New York. You received the 62, or whatever the heck it was, number of payments in New York. There is no reason you would be -- it would not be unreasonable for Clearstream to think it might be hailed into court in New York based on those activities.

MR. KAMINETZKY: Not in this case because what we have here is property in a foreign country held by a foreign intermediary. What you have here is the normal rules -- under 8772, the normal rules don't apply. Generally, if you have a judgment here and you want to enforce it overseas, you start an enforcement action overseas.

What's happened here is that's kind of turned the entire situation on its head. And what that has led to is

1 because we don't have, like I said, an international
2 interpleader, you have Clearstream sitting in the middle,
3 subject to liability in its home country and liability here.

4 Let me put a very fine point on it. Right now, this
5 moment, as I sit here before you, Clearstream is under an
6 order, thanks to Bank Markazi, that says you may not comply
7 with an order by Judge Preska to transfer funds into the United
8 States. We are a Luxembourgish financial institution. Our
9 court in Luxembourg has said, you may not comply with an order
10 of the New York court. We are fighting tooth and nail for that
11 and there is a hearing on that, on the underlying action, on
12 April 2, which is an extraordinarily important date.

13 But think about what happens. If that injunction is
14 maintained in Luxembourg, and your Honor goes the other way and
15 somehow finds, a Luxembourgish institution will be faced with
16 being in contempt of one court or the other, paying twice,
17 which would lead immediately to bankruptcy.

18 This is what happens, your Honor, when politically
19 connected plaintiffs say, we want a specific result in one
20 case. Your Honor, I'm a big boy. I understand that's fine.
21 But that is why there is the third prong of the due process, is
22 jurisdiction reasonable under the circumstances. As your Honor
23 has said in other cases, you have to look at a couple of
24 things. Judicial efficiency as it applies in the international
25 realm. That's one of the factors.

1 Here, the normal rule is, you go to Luxembourg to
2 enforce the U.S. judgment. How do I know that? I know that
3 because many of the same plaintiffs are now in Luxembourg
4 trying to enforce the judgment.

5 What you have here is one of the more important
6 Luxembourg institutions being threatened with literal ruin and
7 bankruptcy if you would exercise jurisdiction in a case that
8 has nothing to do with property in the United States. I think
9 the reasonableness prong here is extraordinarily important and
10 you just can't skirt over it.

11 The final point I want to make, your Honor, is that if
12 the Court would somehow conclude, notwithstanding all that we
13 discussed, that summary judgment in favor of the plaintiffs was
14 appropriate, the parties are going to need sufficient time to
15 negotiate and obtain the Court's input on any sort of turnover
16 order. As you have been hearing, there are many complexities
17 here, including regulatory licenses, the setting up of a
18 qualified settlement fund.

19 THE COURT: It will take you past April 2, right?

20 MR. KAMINETZKY: Just to give you an idea, the
21 Peterson 1 case, which in a lot of ways was much simpler, it
22 took four and a half months to negotiate between the parties.
23 I'm sure it will take less time here, but this is not a simple,
24 as you could explain -- we also have the idea, is there
25 anything that we could do to mitigate catastrophe and

double-liability risk.

If your Honor gets it wrong and grants the summary judgment, this is going to be a very complex situation that's going to need some thought on how to get it done. I don't think anyone here would dispute that.

THE COURT: I don't think they would.

Anybody else want to be heard, or are we exhausted? I know I am.

MR. COLELLA: Thank you, your Honor.

MR. BONNER: Thank you, your Honor.

THE COURT: Counsel, thank you for your wonderful arguments and your wonderful papers.

The Court reserves. Thank you.

(Adjourned)